Supreme Court, U.S.
FILED

041635 APR 1 - 2005

OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

FRANK LORDI,

Petitioner,

v.

TODD ISHEE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MAX KRAVITZ
Counsel of Record

KORT GATTERDAM
KRAVITZ, GATTERDAM & BROWN, L.L.C.
145 EAST RICH STREET
COLUMBUS, OH 43215
(614) 464-2000

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:01CV1725

[Filed July 23, 2002]

FRANK LORDI,	)
Petitioner,	)
	)
v.	)
	)
TODD ISHEE, WARDEN,	)
Respondent.	)
	)

JUDGE NUGENT
MAGISTRATE JUDGE VECCHIARELLI

REPORT AND RECOMMENDATION

Petitioner, Frank Lordi ("Lordi"), challenges the constitutionality of his conviction in the case of *Ohio v. Lordi,* Case No. 98-CR-295. Lordi, through counsel, filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on July 17, 2001 with the United States District Court for the Northern District of Ohio. (Doc. No. 1.) This matter is before the undersigned Magistrate Judge pursuant to Local Rule 72.2. For reasons set

forth in detail below, the Magistrate Judge recommends the petition for habeas corpus be DENIED.

I. Background

A. Statement of Facts

The Seventh District Court of Appeals for Mahoning County, Ohio set forth the following facts underlying Lordi's conviction:[1]

> Around 1997 or 1998, appellant purchased ABC Fire Extinguisher Company, and is the President of the company. Appellant also serves as a general partner in ABC Hood Cleaning Company. Appellant's brother, Ronald Lordi, is an employee of ABC. Appellant was elected Mahoning County Commissioner in 1992, taking office in January, 1993. From 1993 through 1996, appellant served on the Issue 2 Committee on behalf of the county commissioners. This Committee votes on requests for road improvement from various municipalities within the county. All such contracts had to be approved by the county commissioners.
>
> In 1994, William Kovass, a local businessman, sought to construct a hotel in Mahoning County. Kovass was a principal partner in Meander Inn, which already owned a Best Western Hotel, and wanted to construct a Hampton Inn on the adjacent property. In order to construct the new hotel, Meander Inn took out five

---

[1] Factual determinations by state courts are entitled to a presumption of correctness. *House v. Bell,* 283 F.3d 37 (6th Cir. 2002).

development loans, including a $180,000 Community Development Block Grant (CDBG) administered by the Mahoning County Commissioners, and a $100,000 matching loan from the Mahoning County Revolving Loan Fund.

In his capacity as Mahoning County Commissioner, appellant signed an economic development agreement between Mahoning County and Meander Inn in September of 1996, authorizing disbursement of the $180,000 loan. Mahoning County took a security interest in various fixtures owned by Meander Inn to secure payment of the loan and construct the Hampton Inn. In his capacity as Mahoning County Commissioner, appellant also moved and voted for the resolution which approved the $100,000 matching loan for the development project.

In late 1994, or early 1995, Kovass went to the Mahoning County Commissioner's office to make a presentation to the commissioners in support of his application for a CDBG loan. Appellant was present at this meeting. Following the presentation, appellant told Kovass "not to forget his brother for the fire extinguishers." Kovass felt that appellant solicited him to purchase fire extinguishers from ABC. Kovass told appellant to contact his business manager, Janet Perry.

Thereafter, an ABC employee came to Janet Perry's office and asked to do some work. Appellant's brother sent a price quote to Ms. Perry on May 16, 1995. Meander Inn did in fact purchase fire extinguishers, related equipment, and services from ABC, beginning in December of 1995. The hotel opened in 1996.

On June 13, 1995, the Mahoning County Commissioners met at 10:00 a.m. to begin a luncheon tour at the Goshen Township Hall. The Goshen Township trustees had asked the commissioners to look over their records because they were in bad shape. The trustees wanted to see what could be done as far as repairing the roads. The township clerk was aware that appellant was the Issue 2 representative for the Mahoning County Commissioners. All three commissioners, including appellant, rode through the township in a mini-bus with various Goshen Township officials, viewing the roads in need of repair. The group discussed how to fix rite roads, and looked to see if the commissioners could help the township.

When the trustees returned to the township garage, they proceeded to show the commissioners some of their equipment. The township clerk, Hilda Spack, stayed behind. Appellant stood and talked to Spack. Appellant saw their fire extinguisher, and asked who serviced the extinguisher, Appellant told Spack that if the contract ever came up, he would like a chance to bid on it. According to Ms. Spack, she felt that appellant was soliciting the contract.

In 1994, appellant was a member of Democrats for Change, a grassroots effort to change the leadership of the Democratic Party in Mahoning County. The group planned to unseat Don Hanni, the party chairman, and replace him with Mike Morley, by electing their own party precinct members. Appellant's role in Democrats for Change was as part of the recruiting process. He reviewed the precinct fist, seeking to identify people in the community who would run for precinct person. Appellant would then telephone and

interview these people. Joseph Veneroso and Fred Debonis were two individuals who assisted the Democrats for Change. Veneroso worked for the Mahoning County Building Inspector from March of 1993 through May of 1996. Debonis worked for the building inspector from December 1993 through May of 1996, having been hired by appellant. Appellant directed both Veneroso and Debonis to pick up petitions for the Democrats for Change on county time, and to do whatever the people on the committee asked them to do. Appellant told them that if anyone questioned them, they should tell them to call appellant, and he would take care of the problem. When Debonis would mention to his boss that he and Veneroso needed to pick up petitions for Democrats for Change, his boss told the dispatcher not to give them any calls that day. Debonis and Veneroso used a county owned vehicle to pick up the petitions.

John Gillespie was a runner for Democrats for Change during the same time. According to Gillespie, on one occasion, he was asked to pick up some petitions in an outlying area of the county. He refused, and had a physical confrontation with a committee member. Appellant was then called to find someone to pick up the petitions, because they were "under the gun." Veneroso ultimately showed up at Democrats for Change with the required petitions.

(Doc. No 13, Exh. 17.)

B. Procedural History

1. Conviction

On April 1, 1998, the Mahoning County Grand Jury indicted Lordi on eighteen counts, including one count of arson, one count of insurance fraud, two counts of theft in office, one count of coercion, seven counts of unlawful interest in a public contract and six counts of conflict of interest. (Doc. No. 13, Exh. 1.) Upon arraignment Lordi entered a plea of not guilty and the cause proceeded to trial by jury after the prosecution had filed a motion to dismiss the arson and insurance fraud counts. (Doc. No. 13, Exh. 2.) The jury returned a guilty verdict on the following charges: one count for the crime of theft in office in violation of Ohio Revised Code ("O.R.C.") § 2921.41 (A)(2), one count for the crime of unlawful interest in a public contract in violation of O.R.C. § 2921.42(A)(1), and two misdemeanor counts of conflict of interest in violation of O.R.C. § 102.03(E). (Doc. No. 13, Exh. 3.) The trial court sentenced Lordi to eighteen months incarceration on the theft in office conviction and additionally ordered Lordi to pay fines on each of the charges. (Doc. No, 13, Exh. 4.)

2. Motion for a New Trial

Lordi appealed his conviction to the Ohio Court of Appeals for the Seventh District. While this appeal was pending, Lordi filed a motion for a new trial based upon "newly discovered evidence" (Doc. No. 13, Exh. 5), and a supplement in the Mahoning County Common Pleas Court, (Doc. No 13, Exh. 6.) The State filed a motion in response. (Doc. No. 13, Exh. 7,) On August 19, 1999, the Common Pleas Court conducted a hearing in which both testimony and argument was presented. (Doc. No. 13, Exh. 8.) On August

30, 1999, the Common Pleas Court overruled Lordi's new trial motion. (Doc. No. 13, Exh. 9.)

3. Direct Appeal

On March 18, 1999, Lordi timely appealed his conviction to the Ohio Court of Appeals for the Seventh Judicial District. (Doc. No. 13, Exh. 10.) Lordi also appealed the denial of his new trial motion. (Doc. No. 13, Exh. 11.) After the appellate court consolidated Lordi's appeals, Lordi filed a brief in which he raised the following assignments of error: (1) the unlawful interest in a contract conviction was against the weight of the evidence; (2) the conflict of interest conviction was against the weight of the evidence; and (3, 4 & 5) ineffective assistance of trial counsel. (Doc. No, 13, Exh. 12.) On October 20, 2000, the appellate court issued an opinion affirming the trial court's judgment. (Doc. No. 13, Exh. 17.)

Lordi appealed the denial of his direct appeal to the Ohio Supreme Court (Doc. No. 13, Exh. 17) and raised the following propositions of law: (1) courts of limited and exclusive jurisdiction must be created by statute; (2) ineffective assistance of counsel; (3) violation of due process; and (4) violation of the Sixth Amendment. (Doc. No. 13, Exh. 19.) On May 23, 2001, the Ohio Supreme Court denied Lordi leave to appeal and dismissed the appeal as not involving may substantial constitutional question. (Doc. No. 13, Exh. 21.) A subsequent motion for reconsideration was denied on June 13, 2001.

While pursuing his Ohio Supreme Court appeal, Lordi filed, in the Court of Appeals, an application for reconsideration, a memorandum in opposition to a motion to stay, and a memorandum in opposition to a request for an oral

hearing. On November 17, 2000, the Court of Appeals issued an order granting Lordi's application for reconsideration on the issue of prosecutorial misconduct, overruled the application on the conflict of interest issue, and stayed the execution of the trial court's sentence. (Doc. No. 13, Exh. 27.) Upon review, the Court of Appeals addressed and rejected the prosecutorial misconduct claim which it had inadvertently failed to address in its original opinion, and affirmed the judgment of the trial court on December 4, 2000. (Doc. No. 13, Exh. 28.)

Lordi filed a notice of appeal to the Ohio Supreme Court (Doc. No. 13, Exh. 29) and raised only one proposition of law - due process violation. (Doc. No. 13, Exh. 30.) On May 23, 2001, the Ohio Supreme Court denied Lordi's appeal as not involving any substantial constitutional question. (Doc. No. 13, Exh. 32.) On June 13, 2001, the Ohio Supreme Court denied Lordi's motion for reconsideration. (Doc. No 13, Exh. 35.)

4. *Murnahan* Motion to Reopen

On January 5, 2001, Lordi filed a motion to reopen his appeal in the Court of Appeals for the Seventh Judicial District alleging five instances of ineffective assistance of appellate counsel. (Doc. No. 13, Exh. 36.) On February 23, 2001, the Court of Appeals overruled Lordi's motion to reopen. (Doc, No. 13, Exh. 38.)

Lordi appealed to the Ohio Supreme Court, and presented the following propositions of law: (1) an appellate court must reopen a case if an appellant has raised a genuine or colorable issue; (2) if the motion to reopen should have been granted, the Ohio Supreme Court can either remand the case or decide the merits of the appeal; (3) violation of due process;

(4) prosecutorial misconduct; (5) ineffective assistance of appellate counsel; (6) conviction against the weight of authority; (7) ineffective assistance of trial and appellate counsel. (Doc. No. 13, Exh. 40.) On may 23, 2001, the Ohio Supreme Court dismissed Lordi's appeal as not involving any substantial constitutional question. (Doc. No 13, Exh. 42.) Lordi filed yet another motion for reconsideration. (Doc. No 13, Exh. 43.) The Ohio Supreme Court denied Lordi's motion for reconsideration on June 13, 2001. (Doc. No. 13, Exh. 45.)

5. Post-Conviction Petition

Lordi filed a post-conviction petition in the Mahoning County Common Pleas Court raising the same claims which are now before this Court. (Doc. No. 13, Exh, 46.) On August 8, 2001, the Mahoning County Common Pleas Court issued an order dismissing Lordi's post-conviction petition. (Doc. No. 13, Exh. 47.)

6. Habeas Corpus Petition

On July 17, 2001, Lordi, through counsel, filed a petition for habeas corpus with this Court pursuant to 28 U.S.C. § 2254, Lordi alleges the following grounds for relief: (1) prosecutorial misconduct; (2) ineffective assistance of trial counsel; (3) the trial court improperly refused to conduct an inquiry of the jurors; and (4) ineffective assistance of appellate counsel. (Doc. No. 1.)

II. Exhaustion and Procedural Default Standard

Before a federal court may review a federal claim raised in a habeas petition, it must first determine whether the petitioner has exhausted the remedies available to him in state

court. 28 U.S.C. § 2254(b)(1). If a federal habeas claim has not been presented to a state court for adjudication, then it is unexhausted and may not properly serve as the basis of a federal habeas petition. *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977).

Where a claim has been presented to a state court, and that claim was rejected on an adequate and independent state ground without an adjudication on the merits, a petitioner may seek federal habeas review of that claim only where he can establish "cause and prejudice" for the default. *Cone v. Belt,* 243 F.3d 961,967 (6th Cir. 2001). In evaluating claims of procedural default, a reviewing court is guided by the following four-part inquiry:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . Second, file court must decide whether the state courts actually enforced the state procedural sanction. . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986) (internal citations omitted). The procedural default may be excused if the petitioner shows cause for the procedural default and

prejudice from the alleged error. *Id.* Furthermore, even if a petitioner fails to show cause and prejudice, a court must still consider whether special circumstances require that the showing be waived. *Sawyer v. Whitley,* 505 U.S. 333, 339-40 (1992). Specifically, a court may notice an otherwise defaulted claim if it concludes that petitioner has shown by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found him guilty of the crime, or, if the constitutional error occurred during the penalty phase of the trial, that no reasonable juror would have sentenced petitioner to death. *Id.*

III. Standard of Review under the AEDPA

This case is governed by provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), because Lordi filed his habeas petition after the effective date of AEDPA. *See Lindh v. Murphy,* 521 U.S. 320, 326-27, 337 (1997). The relevant provisions of AEDPA state:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of

> the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

Put simply, federal courts are bound by a state court's determination of a petitioner's claims, unless the decision by the state court involved an unreasonable application of clearly established federal law. *Franklin v. Francis,* 144 F.3d 429, 433 (6th Cir.1998). In *Williams v. Taylor,* 120 S. Ct. 1495 (2000), the Supreme Court held that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* Stated differently, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Courts decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 1523. The Court noted that the term "unreasonable" is "no doubt difficult to define," but the Court did not expound on the word's meaning in this context, instead stating that "it is a common term in the legal world, and, accordingly, federal judges are familiar with its meaning." *Id.* at 1522.

The Sixth Circuit interprets the *Williams* test to mean if a court "believe[s] that a state court incorrectly applied federal law, [it] must refuse to issue the writ of habeas corpus if [it] finds that the state court's decision was a reasonable one." *Machacek v. Hofbauer,* 213 F.3d 947, 953 (6th Cir. 2000).

IV. Grounds For Relief

Although Respondent concedes Lordi has exhausted his state court remedies, Respondent argues (1) Lordi has procedurally defaulted his first (prosecutorial misconduct) and third (trial court refusal to inquire of jurors) claims for relief in his federal habeas corpus petition and (2) the remaining grounds for relief are not contrary to, or involved an unreasonable application of clearly established federal law,

A. Prosecutorial Misconduct (Ground One)

Lordi argues the prosecutor committed prosecutorial misconduct through some of his comments during his closing argument.[2] However, Lordi's claim of prosecutorial

---

[2] The comments to which Lordi refers are as follows:

He doesn't give two cents for the ethics laws of this state. (Doc. No. 17, Tr. 909.)

This is nothing but raw political patronage, and you people cannot let him get away with that. (Doc. No. 17, Tr. 911.)

I bet Bill Kovass won't ever forget Mahoning County, because here's a legitimate businessman coming for a loan, and he's getting worked over by a County Commissioner. (Doc. No. 17, Tr. 919.)

This is a business swindle. This is a business swindle by one of your public officials. (Doc. No. 17, Tr. 923-24.)

I remember reading the headlines: *Prosecutor quits. Fraud Probe in Jeopardy.* I remember pulling a quote out of a drawer from John Henley. The quote said, 'If not me, who? If not now, when?' And when the judges asked me

misconduct is procedurally defaulted because Lordi's trial counsel failed to lodge a contemporaneous objection.

Concerning the first two factors of the *Maupin* test, the Ohio Court of Appeals recognized and enforced the procedural bar:

> [Lordi] alleges 44 separate instances of prosecutorial misconduct which he claims occurred during his trial, [Lordi] failed to object to the issues he raises in his brief. Accordingly, we must find plain error in order to reverse. *State v. Long* (1978), 53 Ohio St.2d 91.

(Doc. No. 13, Exh. 28.)

Lordi, however, claims the Ohio Court of Appeals did not enforce the procedural bar. Lordi argues that by conducting a plain-error review, the Court of Appeals excused the procedural default and hence did not enforced the state procedural sanction. However, review by a state court of an otherwise procedurally defaulted claim to determine whether

---

> to do it, I thought of this quote. And now I say to you, 'If not you, who? If not now, when?' (Doc. No. 17, Tr. 970.)
>
> I want this jury to be able to tell the whole world that we're going to hold one of our office holders accountable for violating the law, and I want you to tell the whole world that. (Doc. No. 17, Tr. 972,73.)
>
> I've got a ton better things to be doing than sitting here trying to justify my existence, the shrinking violet that I am. (Doc. No. 17, Tr. 974.)

(Lordi's Traverse, at 11.)

the error, if any, constituted a manifest miscarriage of justice does not revive the defaulted claim for purposes of federal habeas corpus review. *Scott v. Mitchell,* 209 F.3d 854, 868 (6th Cir.2000) ("manifest injustice" review by state court of defaulted claim does not constitute waiver of the default).

As to the third *Maupin* factor, the Sixth Circuit has held the Contemporaneous objection rule is an "adequate and independent" state ground. *Scott,* 209 F.3d at 869 (stating that although the contemporaneous objection rule may have been inconsistently applied, the inconsistency is not severe enough to override the federalism, finality and comity interests served).

As to the fourth factor, Lordi claims the cause for his default was ineffective assistance of trial counsel. Ineffective assistance of counsel is sufficient cause to overcome a procedural default bar. *Murray v. Carrier,* 477 U.S. 478 (1986). Lordi argues his trial counsel should have objected to the prosecutor's comments because the comments were impermissible "send the message" comments. (Lordi's Traverse, at 9-11.) In its rejection of Lordi's claim, the Ohio Court of Appeals rendered the following findings:

> [Lordi] argues that the prosecutor made improper and inflammatory statements in closing arguments. As to Item 5, the prosecutor stated in closing argument that [Lordi's] pattern demonstrated that he did not give two cents for the ethics laws of the State. This was a fair comment, as [Lordi] testified that he did not feel there was anything wrong with voting on a contract in which his company had an interest. Items 6 and 7 refer to the prosecutor's argument concerning [Lordi's] involvement in Democrats for Change, and the prosecutor's statement that the jury not let [Lordi]

get away with political patronage. These comments fell within the wide latitude given to the prosecutor in closing argument, as substantial evidence was presented concerning [Lordi's] political activity in Democrats for Change.

In Item 10, [Lordi] argues the prosecutor improperly inferred that you cannot get elected in Mahoning County unless you are corrupt. The transcript page cited by [Lordi] does not support this claim. In Item 11. [Lordi] argues that the prosecutor inferred that an investigation equated with guilt, as the prosecutor argued that the FBI and the Ohio Ethics Commission would not get involved if the charges were not true. [Lordi] has misquoted the prosecutor's statement. The prosecutor stated, "You think the FBI is going to get in all this malarkey, The FBI? The Ohio Ethics Commission? They're picking on him because [Lordi] has this attitude." This was a fair comment on [Lordi's] claim that file investigators were trying to stretch the law to put it around [Lordi's] neck as a noose, and [Lordi's] own testimony that the FBI was trying to intimidate him.

In Items 16, 20, and 21, [Lordi] argues that the prosecutor made improper statements concerning his personal belief that [Lordi] was guilty. In Item 16, the prosecutor stated that you cannot get elected in Mahoning County and "not be able to coerce an ant." This was a fair rebuttal to argument by [Lordi's] counsel, who stated that [Lordi] could not coerce an ant. As to Item 20, the prosecutor did not express his personal opinion, but rather stated that [Lordi] is guilty, and the State had proved guilt beyond a reasonable doubt. The State is clearly permitted to tell

> the jury what verdict they are requesting. As to Item 21, the prosecutor stated, "I can assure you I don't want one conviction, I want 16 convictions because that defendant is guilty." Again, this was a fair rebuttal to [Lordi's] argument, in which counsel told the jury the prosecutor only wanted a finding of guilty as to one count, in order to justify the high cost of the prosecution.

(Doc. No. 13, Exh. 28.) (citations omitted).

To prove ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation "fell below an objective standard of reasonableness" and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 688, 694 (1984). Further, a defendant must point to actual ineffectiveness, either through specific errors or omissions of counsel, and may not rely solely on the surrounding circumstances. *U.S. v. Cronic,* 466 U.S. 648, 665 (1984).

If calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are impermissible. *United States v. Solivan,* 937 F.2d 1146, 1151 (6th Cir. 1991) (finding that the prosecutor's comment "I'm asking you to tell her and all of the other drug dealers like her that we don't want that stuff in Northern Kentucky..." was impermissible), However, a criminal conviction is not to be lightly overturned solely on the basis of a prosecutor's comments. *U.S. Young,* 470 U.S. 1, 12 (1985). The statements or conduct must be viewed in context in order to determine whether the prosecutor's conduct affected the fairness of the trial, *Id.*

To determine whether the conduct impacted the fairness

of the trial, courts have invoked what is sometimes called the "invited response" or "invited reply" rule. *Lawn,* 355 U.S. 339, 359 n.15 (1958) (finding that the defense counsel's comments attacking the government for "persecuting" the defendants clearly invited the prosecutor's reply vouching for the credibility of the challenged witnesses). However, simply because a response has been invited by a defense argument does not constitute an excuse for that argument, it merely sets the context for considering the impact the improper arguments may have had on the trial. *U.S. v. Young,* 470 U.S. 1, 12 (1985) (limiting *Lawn v. United States,* 355 U.S. 339 (1958)).

Taken together, Supreme Court decisions about the effect of prosecutorial misconduct on due process have first considered whether the conduct complained of was improper, Thereafter, the Court has emphasized a series of factors to be evaluated in determining whether prosecutorial misconduct so infected the trial as to amount to violation of due process: (1) whether the comments were isolated or pervasive, *Donnelly v. DeChristoforo,* 416 U.S. 637, 646; (2) whether they were deliberately or accidentally placed before the jury, *id.* at 647; (3) the degree to which the remarks had a tendency to mislead and prejudice the defendant, *Darden v. Wainwright,* 477 U.S. 168, 182; *Young,* 470 U.S. at 12; (4) whether the prosecutor manipulated or misstated the evidence, *Darden,* 477 U.S. at 182; *Berger v. United States,* 295 U.S. 78, 84-85; (5) the strength of the overall proof establishing guilt, *Darden,* 477 U.S. at 182; (6) whether the remarks were objected to by counsel, *id.* at 182-83 & n.14; *Young,* 470 U.S. at 13; and (7) whether a curative instruction was given by the court, *Darden,* 477 U.S. at 182; *Caldwell v. Mississippi,* 472 U.S. 320, 339 (1985). These factors also repeatedly have been identified by the Sixth Circuit in describing the tests for prosecutorial misconduct. *See, e.g., Kincade v. Sparkman,* 175 F.3d 444, 446 (6th Cir. 1999);

United States v. Francis, 170 F.3d 546, 552 (6th Cir. 1999).

Here, viewed in context, almost all of the prosecutor's comments were permissible. Only one of the prosecutor's comments identified by Lordi was arguably improper. The only comment which appealed to the community conscience of the jury was "I want this jury to be able to tell the whole world that we're going to hold one of our office holders accountable for violating the law." The other comments are not appeals to the jury's community conscience as the comments do not ask the jury to convict in order make a statement.

As to the arguably improper comment, Lordi's trial counsel invited the comment. In his closing argument, Lordi's trial counsel told the jury "when it's all over, you have to send a message. You have to say, 'Look, this courtroom is a place for law, not a vendetta. Take your case and take it to the voters of Mahoning County where it belongs. Don't insult us with this kind of nonsense. We're too smart for that.'" (Doc. No. 19, Tr. 947.)

Besides being an invited reply, the application of the "fair trial" factors reveals that the prosecutor's comments did not deprive Lordi of a fair trial. Although the "send the message" comment made by the prosecutor was made deliberately, it was a single isolated comment. Moreover, the prosecutor's comment was not apt to mislead or prejudice the jury as it was isolated and was merely in response to defense counsel's comment Additionally, the comment did not misstate any evidence as the comment did not reference any evidence. The strength of the overall proof of guilt was substantial as evidenced by the twenty-two witnesses who testified against Lordi.

Therefore, as the prosecutor's comments were not impermissible, Lordi has failed to demonstrate his counsel's representation fell below an objective standard of reasonableness.

As to the prejudice aspect of the *Maupin* analysis, Lordi claims that but for the prosecutor's comments, he would not have been convicted. However, the prosecutor's comments did not address any evidence and the only comment arguably to have incited the jury was made as an invited reply. Furthermore, Lordi has failed to allege he is actually innocent and thus, this Court cannot consider waiving the "cause" and "prejudice" requirements.

Accordingly, Lordi's first ground for relief is procedurally defaulted.

B. Ineffective Assistance of Trial Counsel (Ground Two)

As his second ground of relief, Lordi claims he was denied his right under the Sixth and Fourteenth Amendments to the United States Constitution to effective assistance of counsel because a key prosecution witness was represented by David D'Apolito, a cousin and associate of Lordi's defense counsel, Lou D'Apolito, in a separate matter.

A claim of conflict of interest is a specific type of ineffectiveness claim but is examined under a slightly different standard from that used in a traditional ineffectiveness of counsel claim. The standard as set forth by the Supreme Court requires a defendant to demonstrate that counsel actively represented conflicting interests and an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The Sixth Circuit has interpreted the *Cuyler* test as directing courts "to determine,

on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment.. ." *Smith v. Bordenkircher,* 671 F.2d 986, 987 (6th Cir. 1982).

Lordi is unable to show a conflict of interest. Factual determinations by state courts are entitled to a presumption of correctness. *House v. Bell,* 283 F.3d 37 (6th Cir. 2002). In its rejection of Lordi's conflict of interest claim, the Ohio Court of Appeals rendered the following factual findings which are fully supported by the record:

> Based on the evidence adduced at the hearing on the motion for new trial, the court concluded that Veneroso was indicted for bribery in July of 1996. In November of 1996, pursuant to a plea bargain, he pleaded guilty to falsification. The bribery indictment was dismissed. He was sentenced to six months of house arrest. In January of 1997, the sentence was modified to six months of non-reporting probation. There is nothing in the record to show that Veneroso's plea bargain had anything to do with appellant's case. In fact, appellant was not indicted until two years after David D'Apolito's representation of Veneroso concluded. There is nothing in the record to demonstrate that counsel had an actual conflict of interest which prevented him from effectively representing appellant. In fact, on one of the theft in office charges for which Veneroso was the key witness, appellant was acquitted. While appellant claims that anything his attorney learned during the prior representation with Veneroso would have to remain secret, appellant has not indicated that counsel has possessed any such information, which would

> have been helpful to his case. There is nothing in the record to suggest that David D'Apolito's prior representation of Veneroso required Lou D'Apolito to disregard his duties to appellant.

(Doc. No. 13, Exh, 17.)

The decision of the Court of Appeals is well reasoned, not contrary to established law, and is not an unreasonable application of established federal law.

Even if Lordi demonstrated an actual conflict of interest, he has not shown the conflict caused ineffective assistance in violation of the Sixth Amendment, Lordi argues because of the conflict, his counsel failed to question Veneroso about the conduct that led to Veneroso's falsification conviction as permitted by Ohio Evidence Rule 609(3) and 608(B).[3] Lordi claims his counsel's failure to so question Veneroso was unreasonable because the jury could not properly assess Veneroso's credibility without the information.

Lordi does not dispute that his counsel questioned Veneroso regarding his prior conviction on several

---

[3] Ohio Evidence Rule 609(3) permits "evidence that any witness... has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

Ohio Evidence Rule 608(B) permits "[s]pecific instances of the conduct of a witness... if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness..."

occasions,[4] Rather, Lordi claims his counsel should have

---

[4] The following are exchanges between Lordi's counsel and Veneroso regarding Veneroso's conviction:

> D'Apolito: "Joe, Attorney Betras in Ms opening statement to the jury said that you had pled to falsification or lying, is that correct?"
> Veneroso: "Yes,"
> (Doc. No 17, Tr, 553.)

> D'Apolito: "You felt and still feel that Frank Lordi should come forward when all this happened regarding your plea to this falsification and stood up for you?"
> Veneroso: "I never asked Frank to come forward for me at all."
> D'Apolito: "I'm not asking that. What I asked for, isn't that how you felt?"
> Veneroso: "Sure."
> D'Apolito: And you were mad because he didn't try to get you job back.?"
> Veneroso: "I wasn't mad. I could understand the position he was in, but I wasn't mad."
> D'Apolito: "But you didn't agree with what he did regarding your job?"
> Veneroso: "It's up to the three commissioners, not one."
> (Doc. No. 17, Tr. 563.)

> D'Apolito: "Wait a minute. Your resignation didn't have to do with the charge, but had to do with-"
> Veneroso: "It was because of Mr. Berry."
> D'Apolito: "Well, how is-"
> Veneroso: "Because Mr. Berry set me up."
> D'Apolito: "And he was able to get a conversation on tape of you; is that right?"
> Veneroso: "A very bad conversation that I didn't hear until two weeks ago."

questioned Veneroso about the specific conduct that led to the conviction. This argument is without merit. Lordi's counsel was not necessarily entitled to cross-examine the witness about the specific conduct leading to the conviction.

While the Sixth Amendment guarantees a defendant the right to cross-examine witnesses, it allows a trial judge to place reasonable limits on the cross-examination. *U.S.v. Nelson,* 39 F.3d 705, 708 (7th Cir. 1994). "Trial judges have broad discretion to impose reasonable limits on such cross-examination based on concerns about...harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 678-79 (1986), Limitations on cross-examination do not deny a defendant the opportunity to establish that the witness may have had a motive to lie; rather, the limitations deny a defendant the opportunity to add extra detail to that motive. *Nelson,* 39 F.3d at 708, "But once this core function is satisfied by allowing cross-examination to expose a motive to lie, it is of peripheral concern to the Sixth

---

D'Apolito: "And in that tape, you said things that, in effect, resulted in your plea, right?"
Veneroso: "Yes."
(Doc. No. 17, Tr, 564.)

D'Apolito:"But the reason you are here today is to testify against Frank Lordi because you are mad at Frank Lordi because he didn't stick up for you when you pled to that falsification charge?"
Veneroso: "I'm not mad at him."
(Doc. No. 17, Tr, 608.)

Amendment how much opportunity defense counsel gets to hammer that point home to the jury." *Id.* Here, the relevant fact of Veneroso's conviction was presented to the jury. Further, because the decision of whether to admit details of a conviction is a left to the discretion of the judge, this Court cannot say the judge would have admitted the details of the conviction; and thus, this Court cannot conclude Lordi's counsel was in error for not inquiring about the details. Thus, the failure of Lordi's counsel to question Veneroso about the details of his conviction was not unreasonable.

Lordi has failed to show his counsel's conduct fell far below acceptable standards of representation; and moreover, Lordi has not argued that but for his counsel's conduct, the outcome of the trial would have been different. Accordingly, Lordi has failed to demonstrate the state court determination resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law.

C. Trial Court Misconduct (Ground Three)

In his third ground for relief, Lordi claims he was denied his rights under the Sixth and Fourteenth Amendments because evidence of juror bias existed and the trial court refused to conduct an inquiry of the jurors.

Respondent contends Lordi failed to present fairly his trial court misconduct claim on direct appeal to the Court of Appeals; and thus, the claim is procedurally defaulted. Lordi argues because he raised the claim in his *Murnahan* application to reopen his appeal, he fairly presented the claim to state court. However, the failure to raise the claim initially in a direct appeal from the decision of the trial court constitutes a waiver of the claim, which a *Murnahan*

application to reopen cannot revive. *Lott v. Coyle,* 261 F.3d 594, 611-612 (6th Cir. 2001).

Lordi further argues the Court of Appeals did not enforce the procedural rule because it addressed the merits of Lordi's claim in his application to reopen this appeal. As support, Lordi relies upon *Manning v. Huffman,* 269 F.3d 720 (6th Cir. 2001). In *Manning,* however, the state appellate court actually reopened the case, addressed the merits of an ineffective assistance of trial counsel claim and accepted jurisdiction of the case. The Sixth Circuit reasoned that the state court excused the procedural default and did not enforce the procedural bar because it reopened the case. *Id.* at 724. Here, in contrast to *Manning,* the Court of Appeals denied Lordi's motion to reopen his case because Lordi failed to demonstrate that the alleged trial court misconduct prejudicially affected the outcome of the appeal.

The fact that the Court of Appeals looked at the merits of the alleged error in his *Murnahan* application for purposes of determining the existence of *Strickland* prejudice, is not evidence that the court resurrected the procedurally defaulted claim. The Sixth Circuit has stated that an error raised for the first time in a *Murnahan* application is procedurally barred, even though the court considers the merits of the alleged error. *Lott,* 261 at 611-12. The Sixth Circuit explained "that a court, in reviewing a claim of ineffective assistance of counsel, looks to the merits of the alleged error for purposes of determining the existence of *Strickland* prejudice is not dispositive of the question whether a procedurally defaulted claim has been resurrected." *Id.* at 612. In so holding, the Court relied upon the reasoning of the district court:

> [T]he fact that the state courts engaged in that analysis, as they must under *Strickland,* does not,

> however, serve as evidence that those courts *excused* the procedural default. To hold otherwise would eviscerate the continued vitality of the procedural default rule; every procedural default could be avoided, and federal court merits review guaranteed, by claims that every act giving rise to every procedural default was the result of constitutionally ineffective counsel.

Id. (quoting the opinion of the district court). Thus, the Court of Appeals' consideration of the merits of Lordi's alleged error for purposes of determining the existence of *Strickland* prejudice in his *Murnahan* application, does not support Lordi's argument that the court excused the procedural default.

Additionally, the procedural rule of waiver is an adequate and independent state ground. *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994) (failure to raise a constitutional issue on direct appeal constitutes an "adequate and independent" state ground).

Lordi claims the cause for his default was "appellate counsel's ineffectiveness in failing to object." (Lordi's Traverse, at 23.) However, Lordi does not explain to what appellate counsel should have objected and how the failure "to object" prevented Lordi from raising the issue of trial court misconduct on direct appeal.

Lordi argues he was prejudiced in that the jury was biased against him. However, Lordi has not presented any evidence to show the jury was, in fact, biased against him. Further, Lordi has failed to allege he is actually innocent and thus, this Court cannot consider waiving the requirement that Lordi show cause and prejudice for his default.

Accordingly, Lordi's third ground for relief is procedurally defaulted.

D. Ineffective Assistance of Appellate Counsel (Failure to Raise Juror Bias and Prosecutorial Misconduct) (Ground Four)

As his fourth ground of relief, Lordi claims his appellate Counsel was ineffective in failing to raise the issue of juror bias and failing to raise the most serious instances of prosecutorial misconduct. (Lordi's Pet. Writ of Habeas Corpus, at 19.)

As stated previously, in order to establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation "fell below an objective standard of reasonableness" and (2) counsel's deficient performance prejudiced the defendant, *Strickland v. Washington,* 466 U.S. 668, 688, 694 (1984). Further, a defendant must point to actual ineffectiveness, either through specific errors or omissions of counsel, and may not rely solely on the surrounding circumstances. *U.S. v. Cronic*, 466 U.S. 648, 665 (1984).

1. Jury Bias

Lordi claims an alleged juror statement regarding Lordi's guilt demonstrated jury bias and appellate counsel was constitutionally required to attack the trial court's decision not to explore the matter. In rejection of this claim, the Court of Appeals submitted the following factual findings:

> [Lordi] first alleges that counsel should have raised the issue of the court's failure to conduct an inquiry into an allegation of jury misconduct. The only evidence of

> such misconduct before the court was an anonymous call. As the record does not support a claim of juror misconduct other than this anonymous phone call, [Lordi] has not demonstrated a reasonable likelihood that had appellate counsel raised this assignment of error, it would have been sustained.

(Doc. No. 13, Exh. 38.) The decision of the Court of Appeals is well reasoned, not contrary to established law, and is not an unreasonable application of established federal law.

Lordi claims the basis for the jury bias is that two jurors heard another declare Lordi guilty before the first witness took the stand. However, Lordi does not provide any evidence to suggest this allegation is accurate and in fact, the Ohio Court of Appeals findings of fact reveal the basis for the jury bias claim is a single anonymous phone call. An anonymous phone call alleging vague improprieties on the part of the jury does not amount to jury bias. *U.S.v. Corrado,* 227 F.3d 528, 535 (6th Cir. 2000) (distinguishing the case of an individual physically approaching a juror from the case of an anonymous phone call alleging improprieties.) Accordingly, Lordi has failed to demonstrate his appellate counsel's failure to raise jury bias on direct appeal fell below an objective standard of reasonableness or prejudiced Lordi.

2. Prosecutorial Misconduct

Lordi also claims his appellate counsel was ineffective for failing to challenge the "send a message" comment made by the prosecutor during his closing argument. (Lordi's Traverse, at 31.) However, as stated previously, in considering Lordi's prosecutorial misconduct claims in his motion for reconsideration, the Ohio Court of Appeals found these claims were procedurally defaulted:

> [Lordi] alleges 44 separate instances of prosecutorial misconduct which he claims occurred during his trial. [Lordi] failed to object to the issues he raises in his brief. Accordingly, we must find plain error in order to reverse. *State v. Long* (1978), 53 Ohio St.2d 91.

(Doc. No. 13, Exh. 28.) Therefore, it would have been futile for Lordi's counsel to raise the claim on appeal because the claim would have been procedurally barred.

Accordingly, Lordi has failed to demonstrate his appellate counsel was unconstitutionally ineffective.

V. Conclusion

For the forgoing reasons, the Magistrate Judge recommends Lordi' s petition (Doc. No. 1) be DENIED. Further, for the following reasons, the Magistrate Judge recommends that the Court certify pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. See 28 § U.S.C. 2253(c); Fed. R. App. R. 22(b):

(1) Grounds One (Prosecutorial Misconduct) and Three (Trial Court Misconduct) are procedurally defaulted and petitioner has not alleged sufficient cause to overcome the bar.

(2) Ground Two (Ineffective Assistance of Trial Counsel) is without merit as petitioner's trial counsel did not have a conflict of interest and any alleged conflict did not cause ineffective assistance.

(3) Ground Four (Ineffective Assistance of Appellate Counsel) is without merit because the petitioner failed to

establish that counsel's failure to file a direct appeal of the jury bias claim or the prosecutorial misconduct claim fell below an objective standard of reasonableness, or would have resulted in a reversal of the conviction or affected the outcome of the proceedings.

/s/_____
Nancy A. Vecchiarelli
U.S. Magistrate Judge

Date: July 23, 2002

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of this notice. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).